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MICHAEL RODAK, JR.

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-337

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,
Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,
Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. .....

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Jurisdictional Statement

Appellant Francis F. Doran sued herein as Frank Doran, appeals from a judgment of the United States Court of Appeals for the Second Circuit, entered on June 28, 1974, which affirmed the judgment of the United States District Court for the Eastern District of New York, enjoining enforcement of Town of North Hempstead Local Law #1 of 1973, upon the ground that the same was unconstitutional. Appellant submits this statement to show the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The Second Circuit Court of Appeals filed an opinion, with one judge dissenting, which affirmed the opinion of the District Court. *Salem Inn* v. *Frank*, 364 Fed. Supp. 478 (1973).

Jurisdiction

This action was brought by plaintiffs-appellees under the Federal Civil Rights Act of 1871, 42 USC § 1932, for a declaratory judgment of the constitutionality and to enjoin enforcement of Local Law #1 of 1973 of the Town of North Hempstead, New York. The law prohibits nude and semi-nude dancing by entertainers, or the presentation thereof by owners of bars, cabarets, discotheques, lounges and dance halls in the territorial jurisdiction of the Town of North Hempstead. Local Law #1 of 1973 was declared unconstitutional by the United States District Court and the enforcement thereof by appellant was enjoined. The Second Circuit Court of Appeals affirmed with one dissent on June 26, 1974.

The appeal to this Court lies under 28 USC § 1254(2) since the Court of Appeals held a state statute invalid as repugnant to the United States Constitution. A municipal ordinance qualifies as a "state statute" under 28 USC § 1254 (2) *Chicago* v. *Aldrison T. & S.F.R. Co.*, 357 U.S. 77, 82 (1958); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 US 134 (1962); *Stern & Gressman*, Supreme Court Practice 31-32 (1969).

Relevant Provisions of Local Law No. 1 of 1973 of the Town of North Hempstead

TOWN OF NORTH HEMPSTEAD

Local Law No. 1 of 1973

A Local Law Prescribing the Regulation of Cabarets, Bars, Lounges, Dance Halls, Discotheques and Other Public Places in General.

SECTION 1.0—LEGISLATIVE PURPOSE

It is hereby declared the policy of the Town Board of the Town of North Hempstead, County of Nassau, State of New York, that in order to preserve public peace and good order, and to safeguard the health, safety, welfare and morals within the unincorporated area of the Town of North Hempstead, it is necessary to regulate and control the operations of public places used as cabarets, bars or lounges, dance halls, discotheques and other public places in general so as to fix certain responsibilities and duties of persons owning, operating or controlling such establishments and of persons employed, whether for hire or not, in such establishments.

SECTION 2.0—DEFINITIONS

1. Public Place—Any room, place, or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes: or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar classifications of this section. For the purposes of interpretation, the term "public place", where used in this law, shall include the term "public assembly" or "assembly" as may be used in other

codes, laws, ordinances, rules or regulations, as may be applicable in the Town of North Hempstead.

2. Cabaret—Any public place directly or indirectly selling or serving food, drink, or alcoholic beverages to the public and in which any musical entertainment, singing, dancing in a designated area, or other form of amusement is also permitted, and shall include such a room, place, or space which provides incidental musical entertainment by mechanical devices with or without dancing.

3. Bars, Lounges or Discotheques—Any public place in which the business of directly or indirectly selling and/or serving food, drink, or other beverages to the public is conducted and in which any musical entertainment, singing, dancing in a designated area or other form of amusement is also permitted, and shall include such a room, place or space which provides incidental musical entertainment by live musicians or mechanical devices with or without dancing.

4. Dance Halls—Any public place in which dancing is carried on and to which the public may gain admittance either with or without the payment of a fee.

5. Person—An individual, partnership, club, association, corporation, society, or any other organized group of persons and shall include officers, directors, stockholders, partners and trustees of a club, corporation, partnership, association, or society.

6. Town of North Hempstead—The unincorporated area of the Town of North Hempstead, County of Nassau, State of New York.

SECTION 3.0—PROVISIONS

1. It shall be unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge,

dance hall, or discotheque, or any other public place within the Town of North Hempstead to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. References to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

2. It shall be unlawful for any person to appear in any cabaret, bar and/or lounge, dance hall, or discotheque or any public place with breasts uncovered in such a manner that the portion of the breasts below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any secene, sketch, act, or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

SECTION 4.0—PENALTY

Any person who shall violate any section of this local law shall be guilty of a violation punishable by a fine not exceeding Five hundred ($500.00) Dollars, or imprisonment for a period not to exceed fifteen (15) days or both. Each day's continued violation shall constitute a separate violation.

SECTION 5.0—EFFECTIVE DATE

This local law shall take effect immediately upon the filing with the Secretary of State.

Dated: Manhasset, New York, June 10, 1973.

BY ORDER OF THE SUPERVISOR AND THE TOWN BOARD OF THE TOWN OF NORTH HEMPSTEAD
WILLIAM H. RYAN, JR.
Town Clerk

MICHAEL J. TULLY, JR.
Supervisor

Questions Presented

Whether Local Law #1 of 1973 of the Town of North Hempstead is a valid and constitutional exercise of the police powers of a municipality in furtherance of the public health, safety and welfare.

Whether the federal courts misinterpreted the traditional rules of comity and equity in refusing to abstain from exercising jurisdiction in this case.

Statement of Case

North Hempstead is a town located in northwest Nassau County on Long Island, New York, and has a population of some 242,000 persons. It is adjacent, on its western boundary to the Borough of Queens, City of New York.

On July 10, 1973, after publication of a proposed local law, a public hearing was held and Local Law #1 of 1973 was unanimously adopted by the Town Board and filed with the Secretary of State of the State of New York.

Local Law #1 of 1973 makes it unlawful to offer, present or perform what is commonly known as "topless dancing" in bars, lounges, cabarets, dance halls, discotheques or any public place within the Town of North Hempstead.

Plaintiffs, Salem, Inn Inc., Tim-Rob Bar, Inc. and M & L Rest, Inc. own and operate bars in the Town of North Hempstead in which "topless dancing" is provided as "entertainment" to its patrons. After the effective date of Local Law No. 1 of 1973, the plaintiffs made their "entertainers" wear bikini tops so as to comply with Local Law No. 1 of 1973.

On August 9, 1973, plaintiffs commenced an action for a declaratory judgment and moved by order to show cause for a preliminary injunction and temporary restraining order against enforcement of Local Law No. 1 of 1973 in the United States District Court for the Eastern District. A hearing on the application for a temporary restraining order was held before Judge Dooling on August 14, 1974. Judge Dooling refused to issue a stay of enforcement of Local Law #1 of 1973. Argument on the motion for a preliminary injunction was set for August 17, 1974.

After the complaint in the action for a declaratory judgment was filed, and the request for a temporary restraining order was denied, but before a hearing on the motion plaintiff M & L Rest, Inc. undertook to violate Local Law No. 1 of 1973 by once again providing topless dancing. On August 10, 1974 at 9:25 P.M. the Port Washington Police issued a summons for violation of Local Law No. 1 of 1973 to M & L Rest, Inc., upon the owner thereof and its employees who were dancing.

On September 26, 1973, U.S. District Court rendered its decision holding Local Law No. 1 of 1973 unconstitutionally overboard on its face in the declaratory judgment action and enjoined the enforcement thereof pending further proceedings. Defendant, Frank Doran, appealed to the United States Court of Appeals for the Second Circuit which

rendered its decision on June 26, 1974 affirming the decision of the United States District Court, one judge dissenting.

The Questions Are Substantial

The decision of the Court of Appeals constitutes erroneous application of the existing case law, resulting in an unwarranted expansion of Federal court jurisdiction. The simple issues of valid exercise of local police powers have been confused and hidden by undue complication of the rules of equity and comity. The unwarranted and unnecessary intervention of the Federal District Court, affirmed by the Court of Appeals, is ably stated in Judge Lumbard's dissenting opinion. The Circuit Court of Appeals' refusal to establish a hard and fast rule of federal intervention is juxtaposed by its very establishment of a rule resulting in "a race to the courthouse door".

Since the decisions in *Younger* v. *Harris,* 401 U.S. 37 (1971) and each of its related cases decided by this court left unresolved the question of when federal intervention in state administration of justice or the enforcement of state law is proper, absent pending State criminal proceedings. Federal intervention, long grounded upon rules of equity and comity, thus became the guide of the Circuit Court of Appeals in the resultant, rather novel, albeit simplistic "rule of thumb" in such cases. The Court decided that the court first presented with the issue should retain the cause to disposition.

The issues herein are further complicated by a factual abrogation that, with knowledge of the denial of the temporary restraining order, M & L Rest, Inc. began to violate the unrestrained, presumptively constitutional law. Therefore close scrutiny of the equitable considerations of the Circuit Court of Appeals is necessary to eliminate the further inroads by Federal Courts into State administration of justice.

POINT I

Whether Local Law No. 1 of 1973 is a proper exercise of traditional police powers in furtherance of a legitimate governmental interest.

The threshold issue is whether Local Law No. 1 of 1973 was aimed at a compelling governmental interest that cannot be otherwise achieved, but to burden activity which may contain elements of expression. *U.S.* v. *O'Brien,* 391 U.S. 367 (1968).

Public outcry heard before the Town Board of the Town of North Hempstead, evidenced by the record of the hearing on Local Law No. 1 of 1973 was the basis of the Town Board's entrance into this field of regulation.

While the District Court recognized the Town's police power "can be invoked for the protection of society", the court found Local Law No. 1 of 1973 "inconsistent with the peaceful expression of plaintiffs' constitutionally-protected First Amendment rights." Similarly, the Circuit Court of Appeals, relying upon this Court's decision in *California* v. *La Rue,* 409 U.S. 109 (1972), found an "across the board prohibition". Appellant argued before the District Court and the Circuit Court the prohibition of Local Law No. 1 of 1973 was not an across the board prohibition demonstrated by its narrow legislative intent; to prevent commercial exploitation of nudity. *Crownover* v. *Musick,* 107 *Cal. Rpt.* 681, 509 P2d 497 (1973); *Portland* v. *Derrington,* 253 *Ore* 289, 451 P2d 11 (1969).

Both the District Court and the Circuit Court refused to apply the reasoning of these precedents, or overlooked their import as far as the regulation envisioned by Local Law No. 1 of 1973 was the issue. Rather the Courts below were content with a finding of that which may be protected (i.e. nudity) is afforded protection so absolute that even

that which is not protected is entitled to presumptive protection. This, we submit, is not the law.

Appellant submits that Local Law No. 1 of 1973 should be afforded a presumptive constitutionality. A narrowing delimitation by State Court interpretation of the Local Law No. 1 of 1973, theoretically possible, is made impossible by granting the presumptive protection to the expression rather than to the law.

More importantly, the Courts below overlooked that this Court has never required absolute precision of definitions or applicable scope when considering the constitutionality of local legislation. The Courts below overlooked that legislation is a valid exercise of police power regardless of its failure to precisely define its scope. Precise delineation of which action is a legitimate or illegitimate assumption of power is not dependent upon the scope or coverage of the legislation in question. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

Thus what constitutes the proper subject of local legislation may be the "right thing in the wrong place." 272 U.S. 365, at 387. The validity afforded to legislative enactments, ". . . where bad fades into good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation" is constitutional. 272 U.S. 365, at 388-389. Where the classification is broad so as to be "debatable" the legislative judgment must stand.

These principles precisely applicable in zoning are likewise applicable to any legislation in furtherance of safety, welfare, and protection of the locality. If one may exclude industry from their jurisdictional limits, or nonrelated persons from living as a family in a single dwelling, exclusions of certain defined conduct is proper subject matter of local legislation in furtherance of the same objectives. *Borass* v. *Village of Belle Terre.*

The exclusion of a "pig in the parlor" is a valid exercise of the local police power. *Euclid* v. *Ambler Realty Co., supra.* A basically residential community may under the police power prohibit such conduct that it considers offensive to its well being. These principles were overlooked by the Courts below.

This case mandates further clarification of these rules in relation to local law #1 of 1973. "[E]very line drawn by a legislature leaves something out which might have been included. That exercise of discretion, however, is a legislative function, not a judicial function." *Borass* v. *Village of Belle Terre, supra.*

These rules, we submit, are applicable to this action.

POINT II

Whether the federal courts misinterpreted the traditional rules of comity and equity in refusing to abstain from exercising jurisdiction in this case.

Appellant Frank Doran submits that this case has extended the jurisdiction of the lower Federal Courts far beyond the bounds this Court had defined previously.

This Court had never expressed a definite rule upon which a lower Federal Court could determine the propriety of intervening in vindication of constitutional rights where no prior state action is pending. This Court said:

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in the states at the time the federal proceding is begun." *Younger* v. *Harris,* 401 U.S. 37 (1971).

In the case of *Steffel* v. *Thompson, supra,* this court, addressing itself to declaratory judgments determined the propriety of federal intervention where no state prosecution was pending. The Circuit Court, arguing the ap-

plicability of the *Steffel* rationale, relies upon "equitable 'considerations' in favor of extending federal protection . . ." to the plaintiffs. No determination was made in *Steffel* as to the propriety of federal injunctive relief.

Assuming for the purpose of argument that at least two of the three plaintiffs would under the *Steffel* rationale be entitled to invoke federal jurisdiction for the purpose of a declaratory judgment and a preliminary injunction, the Circuit Court extended its protection to a plaintiff who, after the temporary restraining order was denied, violated the Local Law and was, as a result, arrested. No mention of the latter intentional, unequitable or calculated act of violation is mentioned by the majority.

Undertaking to establish a guide for federal court intervention, the Circuit Court established the rule "of which court is first presented with the question seems a clear cut, reliable and equitable guide to which Court should adjudicate the medits." We do not completely disagree. However for at least one of the plaintiffs state processes had begun.

As Judge Lumbard indicated in the dissenting opinion, the rule established by the majority violates the rules of *Younger* v. *Harris, supra,* because:

> "Federal courts should not intervene absent special circumstances. *Younger* v. *Harris,* 401 U. S. 37 at 45 (1971); *Douglas v. City of Jeanette,* 319 U. S. 157, (1943)"

and for the reason that plaintiffs had an adequate remedy at law and the federal court should defer to state forums, adequate and capable of insuring plaintiffs' constitutional rights.

The dissent recognized that the appellees failed to demonstrate "special circumstances" as defined by this Court's decisions. The fact that a complaint was filed one day prior to the inception of criminal proceedings while ". . . a useful rule of thumb should hardly be applied as

an absolute rule of law." This, says Judge Lombard, represents ". . . a significant departure from traditional equity practice."

The dissenting Judge recognized the "unseemly races to the federal and state courthouse . . ." No more astute and practical observation could have been made. For, in fact, such is now the state of the law of this Circuit which renders the Town of North Hempstead susceptible to a federal court challenge to each and every legislative enactment it may see fit to undertake.

We submit the rationale of the Courts below render it impossible for the Town of North Hempstead to withstand or defend any constitutional challenge to its legislation. Thus, there is warranted a final determination by this Court establishing the guidelines and presumptions governing such legislation.

Recent decisions of this Court have defined the permissible scope of federal intervention with State processes in vindication of constitutional rights where federal action is commenced during the pendency of State criminal processes. Further definition of the permissible scope of federal injunctive relief where State action is pending or commenced simultaneously with federal action, is required. Such definition would reestablish and define the presumption of constitutionality hitherto afforded local legislation. *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Steffel* v. *Thompson*, 94 S. Ct. 209 (1974).

A substantial inroad has thus been cut in the traditional rules of equity and comity which would allow an unwarranted interference and upset the well-preserved balance of federal and state jurisdiction. Under the circumstances, the interests of federal-state comity could hardly be served.

Conclusion

The power of the municipality to regulate and control public nudity by enactment aimed at the commercial exploitation of same, has been, and must be continued in the

locality. The decisions of the courts below substantially limit the power under the guise of a constitutional protection of free expression. While the traditional right of free expression is afforded absolute protection, distinctions of conduct-type expression has never been afforded similar protection. The declaration of unconstitutionality of Local Law No. 1 of 1973 fails to recognize this clear legal distinction. The impact is clear and disastrous to the right of the locality to act pursuant to the police powers to protect the health, safety, and welfare of the people.

Procedural uncertainty complicates the issues by rendering every local enactment subject to review by the federal courts if the plaintiff so chooses. The creation of the "rush to the courthouse" rules has far-reaching impact on the presumption of constitutionality afforded to such Local Laws. Such a rule could strip the State courts of the right to review the laws, the interpretation of which is their constitutional duty, and to which they are the more proper initial forum. Similarly, the increased burden which could be created by this "rule of thumb", on the federal forums cannot be overlooked. The rules of equity and comity must be precisely defined and jealously preserved in the interest of our Federal-State system.

The consequences are far-reaching and of substantial importance, and appellant respectfully requests this court note jurisdiction.

Respectfully submitted,

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Appendix A.

Decision of United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 629—September Term, 1973

(Argued March 5, 1974 Decided June 25, 1974)
Docket No. 73-2436

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Appellants.

Before LUMBARD, OAKES and TIMBERS, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* preliminarily enjoining defendants from prosecuting plaintiffs under Local Law No. 1—1973 of the Town of North Hempstead.

Affirmed.

JOSEPH H. DARAGO, Manhasset, N.Y., *for Appellants.**

HERBERT S. KASSNER, New York, N.Y. (KASSNER & DETSKY, New York, N.Y.; PAUL E. WARBURGH, JR. of counsel), *for Appellees.*

---

* Kenneth C. Butterfield, Town Attorney of the Town of Huntington, filed an *amicus curiae* brief for the Town of Huntington

Appendix A.

OAKES, *Circuit Judge:*

This appeal is from the grant of a preliminary injunction by Judge Bartels against the enforcement by the appellants of Local Law No. 1—1973 of the Town of North Hempstead, New York. This ordinance makes it

> unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge, dance hall, or discotheque, or any other public place, . . . to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering [in other words, "topless"], . . . or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered.[1]

Section 3.0(1), Local Law No. 1—1973, Town of North Hempstead (July 16, 1973). The preliminary injunction was granted at the behest of three different bars, Judge Bartels holding that appellees had sufficiently alleged irreparable harm and that they were likely to succeed on the merits because the ordinance inhibits the full exercise of first amendment freedoms and is overbroad in that "any public place" could include the theater, town hall, opera house, public marketplace, etc., and the ordinance would therefore prohibit performance of a number of works of unquestionable artistic and socially redeeming significance such as the "Ballet Africain," "Hair," and the like.

Appellants argue that the district court should have abstained under *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Byrne* v. *Karalexsis*, 401 U.S. 216

(1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971), and that absent bad faith, harassment or other unusual extenuating circumstances federal injunctive relief should not have been granted. They finally argue that on the merits the ordinance is within local police power and therefore not unconstitutional, with the claimed consequence that preliminary injunctive relief should not have been granted as there is no likelihood of appellees' ultimately prevailing on the merits.

We turn to the question whether principles of equity, comity or federalism preclude issuance of a federal injunction restraining enforcement of the North Hempstead ordinance on the basis of its overbreadth pending trial on the merits. To answer this question it is important to understand precisely the situation of the respective appellees at the time the preliminary injunction was sought. The filing of the complaint in this action was instituted immediately after the ordinance became effective. Thereafter an order to show cause why a preliminary injunction should not be granted was signed by Judge Dooling on August 9, 1973. The following day appellee M & L Rest, Inc., which like the other two appellees had covered up its dancers and thereby discontinued topless entertainment, resumed this form of entertainment, and on that day and each of three successive days M & L Rest, Inc., and its dancers were served with criminal summonses for violating the ordinance, a hearing on which was set in the Nassau County Court for September 13, 1973. The preliminary injunction below was granted on September 6, 1973. The other two appellees, Salem Inn, Inc., and Tim-Rob Bar, Inc., had not resumed topless entertainment prior to the grant of the injunction below. As a result of the ordinance and fear of prosecution thereunder they alleged in their complaint supported by affidavits that the exercise by them and by their dancers of first amendment rights had been chilled and their clientele deprived of the right to view con-

stitutionally protected "expression." They claim, as does M & L Rest, Inc., irreparable injury. In each case as a result of requiring the dancers to wear bikini tops the affidavits contain allegations of "a marked diminution of business" or a "substantial curtailment of our business" which "can result in our having to go out of business." The Tim-Rob Bar alleges that there has been a 50 per cent diminution of business. Again, however, only the M & L Rest, Inc., has had its manager and dancers summoned into court.

Initially, in answer to the question of the propriety of the injunctive relief granted here, we agree with the district court as to the probability of success on the merits. Dancing is a form of expression protected by the first amendment. Even nude dancing in a bar can be within the constitutional protection of free expression. *See California* v. *Larue,* 409 U.S. 109, 118 (1972) (Rehnquist, J.).[3] To the extent that this expression is constitutionally protected, the Town may not prohibit it. Thus, in *California* v. *Larue, supra,* where the Court upheld a regulation forbidding the sale of liquor by the drink where sexually provocative entertainment was performed, it was said, "the critical fact is that California has not forbidden these performances across the board." *Id.* It is, however, just such an "across the board" prohibition which Local Law No. 1—1973 enacts. As such the ordinance would have to fall.[4] *See also P.B.I.C., Inc.* v. *Byrne,* 313 F. Supp. 757 (D. Mass. 1970) (three-judge court), *judgment vacated and remanded to consider mootness,* 401 U.S. 987 (1971); *Hogge* v. *Members of City Council,* 482 F.2d 575 (4th Cir. 1973), *cert. denied sub nom. Joseph* v. *Blair,* 42 U.S.L.W. 3593 (U.S. Apr. 22, 1974).

Next, we also agree with this district court as to the irreparable injury facing appellees in the absence of a preliminary injunction. In a most recent decision of this

court, *414 Theater Corp.* v. *Murphy*, No. 73-2327 (2d Cir. May 17, 1974), slip op. 3563, 3571-72, we were faced with a nearly identical claim of irreparable injury. What we said there is applicable here. In short, if the ordinance here with its $500 per day fine were enforced against these appellees, they would be required to continue in business without presenting their form of entertainment (thereby involving a potential deprivation of their and the public's first amendment rights).[4] In that case, they allege, they would also sustain a "substantial loss of business and threatened bankruptcy."[5] Their option—violating the law to exercise their claimed rights and awaiting prosecution in the New York courts—involves its own loss of economic and personal rights. Here as in *414 Theater Corp.* v. *Murphy, supra*, there is sufficient irreparable injury indicated to justify at least the temporary injunction.

We are left then with the question of the applicability of the *Younger* sextet to the preliminary injunction sought here. With respect to appellees Tim-Rob Bar and Salem Inn the *Younger* question is in exactly the same posture as encountered by this court in the recent decision, *414 Theater Corp.* v. *Murphy, supra*. There too we were faced with a federal action for declaratory and injunctive relief against an overbroad ordinance which was alleged to chill first amendment rights and to cause irreparable harm. There too the district court's grant of preliminary relief was before us for review, challenged on the basis that it violated *Younger's* teaching. In *414 Theater* we affirmed the preliminary injunction, in short because the underlying rationale behind *Younger* did not apply when state prosecutions were not pending when the federal actions were brought. *Id.* at 3573-76. *See Steffel* v. *Thompson*, 42 U.S.L.W. 4357, 4360 (U.S. Mar. 20, 1974); *Lake Carriers' Association* v. *MacMullan*, 406 U.S. 498, 509 (1972). Similarly, we find *Younger* inapplicable to Tim-Rob Bar and

Salem Inn here, and accordingly affirm the preliminary injunctions as to them.

M & L Rest, Inc., poses a slightly different problem. While it is equally true that there was no prosecution pending against M & L when the federal action was *begun*, nevertheless we are faced now with a pending state prosecution begun only one day after the federal action was initiated. Reading both *Younger* and *Steffel* strictly would seem to leave the present situation without a clear decision from the Supreme Court. In *Younger* the Court stated explicitly, 401 U.S. at 41 (emphasis added),

> We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts *at the time the federal proceeding is begun.*

Steffel, moreover, which also speaks only to declaratory judgments, clearly is couched in terms of a fact situation where there is no state prosecution pending at the time of the federal consideration on the merits. On the one hand, it might be argued that considerations of comity and federalism would militate in favor of deferring to the pending state prosecution inasmuch as, according to the rationale of *Younger*, the state criminal proceeding is perfectly capable of protecting the constitutional rights of M & L. On the other hand are, it appears to us, more substantial considerations in favor of extending federal protection, at least in this case, to M & L, even though it is subject at this time to a pending state prosecution. One of these considerations is equity. Here M & L, Tim-Rob and Salem Inn all came equally before the federal court invoking its jurisdiction and protection; to grant relief to two plaintiffs and not the third because of *subsequent* events largely out of its control would be most inequitable. This is especially true where the result might be contra-

dictory outcomes. Second, there is an element of conservation of judicial energy in treating M & L along with Tim-Rob and Salem Inn. That is to say, there is little or no greater expenditure of effort to determine the merits as to M & L as well as to the other two, and by doing so the federal court will have relieved the state court of the burden of relitigating the identical issue on identical facts. In a federal system such as ours, how a federal court's abstention will increase or decrease the workload of all the courts—state and federal—is not an improper consideration. Third, we cannot ignore that lower federal courts are the "'*primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Steffel* v. *Thompson*, 42 U.S.L.W. at 4361 (emphasis original), *quoting* Frankfurter & Landis, The Business of the Supreme Court 65 (1928). As such, either in the absence of other considerations or in their equipoise, this consideration would tip the scales in favor of federal rather than state adjudication in the M& L case.

Finally, we are struck by the practical wisdom of having a clear-cut method of determining when federal courts shall defer to state prosecutions, threatened or pending, and when not. Without such a guide uncertainty and inequitable treatment are bound to result with the possibility of an Alphonse-Gaston routine developing between state and federal courts. The fact of which court is first presented with the question seems a clear-cut, reliable, and equitable guide to which court should adjudicate the merits. Generally, this should result in the most speedy disposition of the merits, which is in both the state's here the municipality's, and the private party's interest. While in some cases such a rule may result in the proverbial rush to the courthouse door, it will guard against attempts by state officials to dispossess federal courts of jurisdiction by

initiating suits after the federal action has begun, and similarly guard against attempts to avoid state judgment by inveighing for federal protection after initiation of the state criminal prosecution. The certainty of where the power of adjudication properly lies, moreover, is likely to save all courts substantial time. Upon these considerations then and in light of the facts before us, we find the district court did not err in extending its preliminary injunction to include a prohibition against further prosecution of M & L Rest, Inc., pending a trial on the merits.[4] *Cf. Boraas* v. *Village of Belle Terre,* 476 F.2d 806, 811 (2d Cir. 1973), *rev'd on other grounds,* 42 U.S.L.W. 4475 (U.S. Apr. 1, 1974).

Judgment affirmed.

1. The ordinance's prohibitory section also makes it unlawful for any person to appear with breasts uncovered, etc. Section 3.0(2), Local Law No. 1—1973, Town of North Hempstead, July 16, 1973.

2. Appellants, moreover, have not actually contended that the dancing involved here is obscene.

3. In reaching such a conclusion, we need not determine that the actual dancing involved in appellees' bars is protected expression. At least with respect to first amendment challenges even those litigants whose activities could be properly prohibited in a closely drawn statute may attack an overbroad statute on its face. *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971). *See also Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973). And clearly the ordinance as written here would encompass protected expression within its prohibitions. If pressed on the record before us, moreover, we would tend to find the dancing here protected expression.

First, as noted above, there is no claim that the dancing here was actually obscene. *Compare California* v. *Larue,* 409 U.S. 109, 111 (1972). Second, while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some "entertainment" with his beer or shot of rye.

4. Just the other day the Supreme Court in a censorship case noted that the *reception* of communications was equally protected by the first and fourteenth amendments as its *expression. Procunier* v. *Martinez,* 42 U.S.L.W. 4606, 4610 (U.S. Apr. 29, 1974) (prison mail). In *United States* v. *Cangiano,* 491 F.2d 906 (2d Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3596 (U.S. Apr. 11, 1974) (No. 73—1526), the writer pointed out in dissent, *id.* at 915, in a case involving also "freedom of expression and its converse, freedom of consumption of thought or . . . freedom of reception," that one must be careful in making judgments in this area to avoid permitting judgments of taste to become rules of law. 491 F.2d at 914 n. 1. *See* Emerson, The System of Freedom of Expression 492 (1969).

5. The trial court held that "[w]hile this claim has not been established, it has not been denied."

6. It is suggested that the statute is susceptible to a limiting or clarifying construction that would avoid the federal constitutional question so as to make abstention appropriate. The argument is that *Brandon Shores, Inc.* v. *Incorporated Village of Greenwood Lake,* 68 Misc. 2d

343, 325 N.Y.S.2d 957 (Sup. Ct. 1971), gave a similar ordinance, on which Local Law No. 1—1973 was based, a narrowing construction. We do not fathom what that narrowing construction was, however. Justice Cerrato said that the Greenwood Lake ordinance was "anything but vague and indefinite. It clearly sets forth the act to be prohibited, who it applies to, the circumstances under which it applies, and the penalty therefor." 325 N.Y.S.2d at 961. In short, he dealt with the question of vagueness; he never came to the question of overbreadth, the flaw in the ordinance before us. In other words, we are asked to abstain on the sheer speculation that state courts might interpret Local Law No. 1—1973 contrary to its explicit language, thereby removing the constitutional question. Such speculation does not satisfy the "special circumstances" required to make abstention proper. *See Zwickler* v. *Koota*, 389 U.S. 241, 249-52, 254 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 375-78 (1964).

Lumbard, Circuit Judge (dissenting):

I dissent.

Traditional principles of equity, comity, and federalism require that we reverse the district court and permit the pending state criminal prosecution of M & L Rest to proceed.

As Mr. Justice Black emphasized in his opinion for the Supreme Court in *Younger* v. *Harris*, 401 U.S. 37 (1971), even when there is only a threat of state prosecution, a federal court should not intervene absent a showing of "special circumstances," such as bad faith or harassment on the part of state or local officials. 401 U.S. at 45. *See also Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943); *Fenner* v. *Boykin*, 271 U.S. 240 (1926). The reasons for this are two-fold. First, equitable relief traditionally has not been granted where there is an adequate remedy at law. Vindication of constitutional rights in a state criminal

proceeding is deemed an adequate legal remedy. The fact that an individual may be compelled to challenge the constitutionality of a state statute or local ordinance in a state criminal proceeding does not constitute the sort of great and immediate irreparable harm that must be shown before a federal court should consider granting equitable relief. *Ex parte Young*, 209 U.S. 123, 145-47 (1908); *Cameron* v. *Johnson*, 390 U.S. 611 (1968). Second, the overriding interest in federal-state comity and the avoidance of needless friction between the federal and state judicial systems requires that due deference to the state judicial process be shown by the federal courts. The state courts are fully capable of fairly and properly adjudicating suits involving federal rights and should be permitted to do so. *Douglas* v. *City of Jeannette, supra*, 319 U.S. at 163.

Here, plaintiffs have failed to show that they "have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith." *Id.* at 164. No showing of bad faith, harassment, or any other "special circumstances" has been made. Under the circumstances, there is no reason why the federal courts should now intervene to enjoin an on-going prosecution.

It is, of course, true that the federal complaint requesting injunctive relief was filed one day prior to the commencement of the state criminal proceeding, which was only threatened at that time. On this basis, the majority argues that the need to demonstrate "special circumstances" justifying federal equitable intervention is unnecessary. The distinction urged between threatened and pending state prosecutions, while a useful rule of thumb, should hardly be applied as an absolute rule of law. A hard and fast rule based on this distinction would represent a significant departure from traditional federal equity practice, *e.g.*,

Douglas v. *City of Jeannette, supra,* 319 U.S. 157 (1943), *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935), *Fenner* v. *Boykin, supra,* 271 U.S. 240 (1926), *Ex parte Young, supra,* 209 U.S. 123 (1908). Additionally, it would encourage unseemly races to the federal and state courthouses, with each party seeking to commence its action first. The preservation of the delicate balance between the federal and state courts, a consideration of the utmost significance in our judicial system, *Younger* v. *Harris, supra,* 401 U.S. at 44, would be ill-served by such an approach, which would leave little, if any, room for a careful analysis of the particular, often unique, factors present in each case.

The need for particularized analysis is amply demonstrated by the present case. Here the federal suit was initiated prior to the state prosecution, but by only one day. In their complaint filed in the district court on August 9, 1973, plaintiffs sought a temporary restraining order in addition to a preliminary injunction. While the return date for the motion for a preliminary injunction was set for August 22, thirteen days after the motion was made, the motion for a temporary restraining order against the enforcement of the ordinance in the interim was denied on August 9, the same day it was made and the day before the criminal summons was served on M & L Rest. M & L Rest continued to provide topless entertainment in violation of the local ordinance, although it knew that the federal court, by denial of a temporary restraining order, had explicitly refused to insulate it from state prosecution at least until August 22. The local authorities, too, had reason to believe that at least until the return date for the motion for a preliminary injunction the federal court would not interfere with the enforcement of the ordinance and the prosecution of any violators. When the return date for the motion arrived and an injunction was issued, the

state prosecution had already commenced. The criminal summons had been served and a hearing date had been scheduled. Under these circumstances, the interests of federal-state comity could hardly be served by now compelling the state to halt its prosecution of M & L Rest pending a federal court determination of the statute's constitutionality.[1]

As for the two other federal plaintiffs, Tim-Rob Bar and Salem Inn, which are not presently subject to criminal prosecution, the suit against M & L Rest may very well be dispositive of their claim.[2] At a minimum, the state courts should be afforded an opportunity to decide the ordinance's constitutionality. This is particularly advisable because it seems likely that the statute in question can be given a narrow, constitutional construction by the state courts. For example, were the statute here interpreted as limited to places in which liquor is served, it could be regarded as a legitimate exercise of the local authorities' police power. *California* v. *LaRue*, 409 U.S. 109 (1972).

In this regard, the majority's reliance on *414 Theater Corp.* v. *Murphy*, No. 73-2327 (2d Cir. May 17, 1974), slip op. 3563 is misplaced. *414 Theater Corp.* in no way com-

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[1] Steffel v. Thompson, 42 U.S.L.W. 4357 (March 19, 1974) is in no way dispositive here. In *Steffel*, the Supreme Court made clear that it was not addressing itself to the questtion of the appropriateness of injunctive relief against threatened and pending state prosecutions. *Id.* at 4360-71.

[2] The majority argues that an approach which would deny M & L Rest resort to the federal court for injunctive relief while allowing it for Salem Inn and Tim-Rob Bar, would work an inequitable result, waste judicial resources, and lead to possibly contradictory decisions on the ordinance's constitutionality. These difficulties may all be avoided if the state courts are first permitted the opportunity to construe the ordinance and determine its constitutionality in the state criminal proceeding against M & L Rest.

pels us to grant the injunctive relief sought here. Indeed, in that case the federal district court initially denied the request for a preliminary injunction "in order to permit the matter to be litigated in the state courts." 360 F. Supp. 34, 35 (S.D.N.Y. 1973). It was only after the state courts had "had ample opportunity to consider the question [of the ordinance's constitutionality] in related cases and [had] declined to do so," *id.* at 36, that 414 Theater Corp. was permitted to renew its petition for injunctive relief in federal court. Moreover, the injunction was finally issued against a background of threatened harassment by local officials who apparently planned to initiate civil suits against 414 Theater Corp. and other peep show operators, despite an unappealed New York City Criminal Court ruling that the ordinance at issue was unconstitutional. At no time did the procedural setting approximate the situation here, where a state prosecution was going forward at the time of the hearing in the federal court, a prosecution which was based on violations occurring during the period in which the federal court had expressly declined to stay the enforcement of the law.

Of course, the plaintiffs here would be free at some later time to seek relief in federal court upon a showing, for example, that the prosecution in the state court was not proceeding with appropriate speed or that the plaintiffs were being harassed. But barring these or other "special circumstances" the proper course would be to raise the constitutional issues in the state criminal proceedings against M & L Rest.

Appendix B.

Opinion and Order of the District Court Eastern District of New York.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-C-1200

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Plaintiffs,

against

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as town attorney of the town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants.

Appearances:

KASSNER & DETSKY, Esqs.
Attorneys for Plaintiffs
PAUL E. WARBURGH, JR., Esq.
Of Counsel

JOSEPH JASPAN, Esq.
County Attorney of Nassau County
Attorney for Defendant Louis J. Frank
LOUIS SCHULTZ, Esq.
Of Counsel

JOSEPH H. DARAGO, Esq.
Attorney for Defendant Frank Doran

RESSA & NAPPI, Esqs.
Attorneys for Defendant Howard Einhorn
RALPH A. NAPPI, Esq.
Of Counsel

Appendix B.

BARTELS, D.J.

Plaintiffs are domestic corporations operating bars at various addresses in the Town of North Hempstead, and provide for their customers entertainment in the form of topless dancing. On July 17, 1973, the Town of North Hempstead passed Local Law No. 1—1973,[1] making it unlawful (i) for any person conducting or operating any bar, lounge or other public place to permit a waitress, bar maid or entertainer to appear with uncovered breasts, or (ii) for any person to appear in any bar, lounge or public place with uncovered breasts or to appear in any entertainment or sketch with uncovered breasts. The maximum penalty for a violation is a fine of $500 or imprisonment for fifteen days, or both, each day's violation constituting a separate violation.

Plaintiffs seek injunctive and declaratory relief, pursuant to 28 U.S.C. §§ 2201 *et seq.* against the enforcement by the defendants of the Local Law, charging a violation of their civil rights under 42 U.S.C. § 1983. On August 9, 1973, they moved for a preliminary injunction and at the same time for a temporary restraining order. The temporary restraining order was denied by Judge Dooling and the return date for the motion for preliminary injunction was fixed by consent for August 22, 1973. On August 10, 1973, after the denial of the temporary restraining order but before the hearing on the preliminary injunction, one of the plaintiffs, M & L Rest, Inc., resumed its entertainment consisting of topless dancing, and consequently on that day and each of the three successive days the owner and the dancers were served with criminal summonses for violating the ordinance, and a hearing was set therefore in the Nassau County Court for September 13, 1973. It is uncontested that plaintiffs in the operation of their bars have for a number of years permitted female dancers to

appear on the stage with uncovered breasts in order to provide entertainment for their respective customers. Since the passage of the law all plaintiffs but M & L Rest, Inc. have discontinued the topless dancing entertainment in their bars. Plaintiffs allege that the ordinance is unconstitutional because it inhibits the full exercise of their First Amendment freedoms and is overbroad, claiming that they should not be required to defend criminal prosecutions to vindicate their constitutional rights, citing, among other authorities, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), and *Zwickler* v. *Koota*, 389 U.S. 241 (1967). They claim irreparable harm resulting from substantial loss of business and threatened bankruptcy. While this claim has not been established, it has not been denied.

I

For the reasons hereinafter stated, the Court finds that the ordinance is facially unconstitutional. Although *Dombrowski*[2] and *Zwickler* sanction federal intervention, the Court is faced with the restrictions placed upon such anticipatory challenges to a state ordinance by *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971), and *Byrne* v. *Karalexis*, 401 U.S. 216 (1971). Those cases held that the federal courts were precluded, except in "exceptional and extremely limited circumstances," from intervention by way of either injunctive or declaratory relief in any existing state criminal prosecutions. Such extraordinary circumstances may be found (1) where there is harassment and bad faith by the local officials in enforcing a state statute or ordinance, or (2) where irreparable injury might result from the enforcement of a statute that is "patently and flagrantly unconstitutional on its face." See *Younger*, and companion

cases, *supra*. Thus, the principles of *Dombrowski* and *Zwickler* must be administered with great caution and with the realization that their sweep has been somewhat curtailed. In short, where the state has already initiated criminal proceedings, the Court must not reach out and enjoin the same absent extraordinary circumstances. Explicitly left open by the Supreme Court was the question "about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." *Younger* v. *Harris, supra*, 401 U.S. at 41. In *Lake Carriers' Association* v. *MacMullan*, 406 U.S. 498, 509 (1972), Mr. Justice Brennan seemed to answer the question stating that "in the absence of a pending state proceeding . . . exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." Other cases following *Younger* have permitted federal intervention even though a state proceeding was initiated one day after the federal proceeding. *Boraas* v. *Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973); *Kennan* v. *Nichol*, 326 F.Supp. 613 (W.D.Wis.1971).

In this case there was no state proceeding pending on August 9th at the time the complaint was filed and the application for a temporary restraining order heard. It was not until August 10th after the denial of the restraining order that a summons was served and state prosecution initiated with respect to one of the plaintiffs who refused to observe the ordinance. But this was after this Court assumed jurisdiction. The remaining two plaintiffs continue their compliance with the Local Law and are not subjected to any state proceeding. A hearing in the county court on the presently pending criminal proceeding against M & L Rest, Inc. is scheduled for September 13, 1973, and there is no indication as to when a final determination will be made by the county court. Even when

made such a determination may not necessarily dispose of the claims of the other two plaintiffs. Assuming that this state proceeding against M & L Rest, Inc. was pending at the time the federal proceeding was begun, this circumstance would not be a sufficient reason for abstention with respect to the other two plaintiffs who have complied with the ordinance but are threatened with prosecution upon violation. We do not believe these plaintiffs should be forced to violate the Local Law affecting their First Amendment rights, and subject themselves to a criminal prosecution in order to place themselves before the same judicial formum scheduled to decide the case of the other plaintiff, M & L Rest, Inc. See *Wulp* v. *Corcoran,* 454 F.2d 826 (1st Cir. 1972). Moreover, a prior state court decision, *Brandon Shores, Inc. and Patricia A. Soll* v. *Incorporated Village of Greenwood Lake,* 68 Misc.2d 343, 325 N.Y.S.2d 975 (Sup.Ct. Orange Co. 1971), upheld a similar ordinance without facing the constitutional issue involved. See *Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota, supra.*

We conclude, therefore, that under the circumstances the pendency of a state court proceeding against one of the federal plaintiffs should not bar the others from anticipatory federal relief. See *Thoms* v. *Heffernan,* 473 F.2d 478 (2d Cir. 1972). If federal relief is granted to these two plaintiffs, it would be anomalous not to extend it to all plaintiffs. Likewise, arrest and the direct and immediate fear of arrest and prosecution under the Local Law is requisite "injury" to afford the necessary standing for plaintiffs to institute the action. See *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

Defendants' reliance upon the federal anti-injunction statute, 28 U.S.C. § 2283, which with certain exceptions expressly restrains a federal court from enjoining a state

court proceeding, is misplaced. This statute is not applicable to a civil rights action which falls within the statutory exception and where injunctive relief is not otherwise barred by the principles of *Younger*. *Mitchum* v. *Foster*, 407 U.S. 225 (1972); *Sheridan* v. *Garrison*, 415 F.2d 699 (5th Cir. 1969).

II

Defendants argue that the justification for the ordinance is the exercise of police power by the local community to bar conduct it deems offensive to its own general welfare, public safety, order and morals. Defendants maintain that the principles enunciated in *Paris Adult Theatre I, et al.* v. *Slaton*, 93 S.Ct. 2628 (1973), and *Miller* v. *California*, 93 S.Ct. 2607 (1973), justify the constitutionality of this particular ordinance under some community standard test. They argue that in both of those cases the Court upheld anti-obscenity legislation by adopting a "contemporary community standard" test and holding that community welfare could be debased "by crass commercial exploitation of sex." This argument is difficult to follow because in a non-obscenity context there is no "contemporary community standard" test that would justify a restriction upon plaintiffs' First Amendment freedoms. *Miller* v. *California*, *supra*.

Other authorities cited by the defendants in support of the ordinance are *Brandon Shores*, *supra*, and *California* v. *LaRue*, 409 U.S. 109 (1972). *Brandon* upheld an ordinance in many respects similar but not as broad as the ordinance herein involved. The Court there found that the Village of Greenwood Lake acted properly and within the limits of its police power. No reason was given why plaintiffs' First Amednment rights were not violated or on what basis the police power of the state could so easily brush aside plaintiffs' constitutional guarantee of freedom

of speech. With all due deference to the state court, this Court finds that it cannot adopt its rationale.

In *California* v. *LaRue, supra,* it was held that the California State Liquor Authority had a right to regulate topless dancing in bars and cabarets within the purview of its authority to control the sale of alcoholic beverages under the Twenty-first Amendment. This decision is cited for the principle that the privileges and immunities of the First Amendment are not absolute or without limitation. Obviously *LaRue,* which is predicated upon the powers of the State Liquor Authority, has no relevance to the constitutionality of the present ordinance, which has no other justification than the exercise of the police powers of the community. While it is true that the police power of the state may be invoked for the protection of society, it cannot be exercised in a manner inconsistent with the peaceful expression of the plaintiffs' constitutionally protected First Amendment rights. *Edwards* v. *South Carolina,* 372 U.S. 229 (1962); see also *Miller* v. *California, supra,* at 2616, n. 8.

We recognize, as stated in *Younger* v. *Harris, supra,* 401 U.S. at 51, that "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means." However, we cannot escape the conclusion that there is more than simply a "chilling" effect upon First Amendment rights in the enforcement of this ordinance.

III

Turning to the merits of the application, it appears clear that dancing is a form of expression protected by the First

Amendment. In fact, this is not denied by the defendants, who admit that no question of obscenity is here involved and that even dancing in the nude may fall within the purview of First Amendment protection. See *California* v. *LaRue, supra; PBIC, Inc.* v. *Byrne,* 313 F.Supp. 757 (D. Mass. 1970), *judgment vacated and remanded to consider mootness,* 401 U.S. 987 (1971); *Southreastern Promotions, Ltd.* v. *Atlanta,* 334 F.Supp. 634 (N.D.Ga. 1971); *Southeastern Proomtions, Ltd.* v. *Mobile,* 457 F.2d 340 (5th Cir. 1972); *Yauch* v. *State,* 19 Ariz.App. 175, 505 P.2d 1066 (1973); *In re Giannini,* 69 Cal.2d 563, 446 P.2d 535, 72 Cal.Rptr. 655 (1968).

It also appears that the ordinance is so broad that it "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech" *Thornhill* v. *Alabama,* 310 U.S. 88, 97 (1940). Moreover, there is no room in the ordinance for "a state construction which might obviate the need for a decision on the constitutional issue." *Zwickler* v. *Koota, supra,* at 256-57 (Harlan, J. concurring). The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance. The ordinance would also prohibit the production of the musical performance "Hair," which included a female topless performer but was protected against prosecution under a Massachusetts obscenity statute. See *PBIC, Inc.* v. *Byrne, supra.* We, therefore, believe that on its face as drawn the ordinance is constitutionally invalid as an infringement upon plaintiffs' First Amendment freedoms.

Appendix B.

In conclusion, we find that (1) Local Law No. 1-1973 of the Town of North Hempstead is on its face violative of plaintiffs' First Amendment rights in that it prohibits across the board non-obscene conduct in the form of topless dancing, and (2) that the daily penalty of $500 for each violation of the ordinance, the prior state court decision validating a similar ordinance, the overbreadth of the ordinance, and the potential harm to plaintiffs' business by its enforcement justify federal intervention and injunctive relief.

Therefore, it is hereby ordered that pending the final determination of this action the defendants and each and everyone of them are hereby enjoined from prosecuting the plaintiffs for any violation of Local Law No. 1-1973 of the Town of North Hempstead or in any way interfering with their activities which may be prohibited by the text of said Local Law.

Dated: Brooklyn, N. Y., September 6, 1973.

JOHN R. BARTELS
United States District Judge

Appendix B.

FOOTNOTES

[1] Local Law No. 1-1973 provides, in part:

"SECTION 3.0—PROVISIONS

1. It shall be unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge, dance hall, or discotheque, or any other public place within the Town of North Hempstead to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

2. It shall be unlawful for any person to appear in any cabaret, bar and/or lounge, dance hall, or discotheque or any public place with breasts uncovered in such a manner that the portion of the breasts below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act, or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female."

"Public Place" is defined in Section 2.0 as "Any room, place, or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes; or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar classifications of this section. For the purposes of interpretation, the term 'public place', where used in this law, shall include the term 'public assembly' or 'assembly' as may be used in other codes, laws, ordinances, rules or regulations, as may be applicable in the Town of North Hempstead."

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[2] In *Dombrowski* indictments had been returned in the state court prior to the decision of the Supreme Court which issued a mandate including directions for "framing of a decree restraining prosecution of the pending indictments against the individual appellants . . ." 380 U.S. at 497.

Appendix C.

Judgment Appealed From.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

73-2436

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of June one thousand nine hundred and seventy-four.

Present: HON. J. EDWARD LUMBARD
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges.

Salem Inn, Inc., M & L Rest, Inc.,
and Tim-Rob Bar, Inc.,

Plaintiffs-Appellees,

v.

Louis J. Frank, individually and as Police Commissioner of Nassau County, Frank Doran, individually and as Town Attorney of the Town of North Hempstead, and Howard Einhorn, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Appendix C.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

Appendix D.

Filed August 15, 1974

Notice of Appeal to the Supreme Court of the United States.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action No. 732436

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Plaintiffs-Appellees,

—against—

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that FRANK DORAN, defendant above named, hereby appeals to the Supreme Court of the United States as of right from the decision of the United States Court of Appeals, Second Circuit, and each

and every part thereof, entered in this action on June 25, 1974.

This appeal is taken pursuant to 28 USC § 1254(2).

Dated: Manhasset, New York, August 1, 1974.

JOSEPH H. DARAGO,
Attorney for Appellant, Francis F. Doran, Individually and as Town Attorney of the Town of North Hempstead
220 Plandome Road
Manhasset, New York 11030

516-627-0590

To:

CLERK OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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Brooklyn, New York 11201

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